Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

BRENDA RAMBO,

Petitioner,

v.

DELTA FAMILY-CARE DISABILITY,
and SURVIVORSHIP PLAN,

Respondent.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. **Does *Bragdon v. Abbott*, 524 U.S. 624 (1998) Apply to ERISA Cases?**

The first question is whether this Court's decision in ***Bragdon v. Abbott***, 524 U.S. 624 (1998) that asymptomatic HIV is a disability of a major life function under the Americans With Disabilities Act, applies to disability plans governed by the Employee Retirement Income Security Act (ERISA).

B. **Are Courts of Appeals' Decisions on Social Security Cases Relevant to ERISA Cases?**

The second question is whether United States Courts of Appeals' decisions on Social Security appeals are relevant to ERISA cases.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

Description: Page No.

Questions Presented For Review i

Parties to the Proceeding ii

Table of Contents iii

Appendix v

Table of Authorities vi

Petition for Writ of Certiorari 1

I. Citations of Orders and Opinions Entered 1

A. Order Granting Defendant's Motion For Summary Judgment; Denying Plaintiff's Motion For Summary Judgment; Vacating Hearing 1

B. Judgment In A Civil Case 1

C. Memorandum 1

TABLE OF CONTENTS CONTINUED

Description:		Page No.
II.	Bases for Jurisdiction in This Court	2
	A. Bases for Jurisdiction	2
	B. Statutory Provision Conferring Jurisdiction	2
III.	Statement of the Case	3
	A. Facts	3
	B. Basis for Federal Jurisdiction in the United States District Court	5
	C. Reasons Relied on for Allowance of Writ	6
IV.	Conclusion	13

Appendix

A. Memorandum, United States Court of Appeals, 9th Circuit, June 1, 2001 ..... 1a

B. Order Granting Defendants Motion Or Summary Judgment; Denying Plaintiff's Motion for Summary Judgment; Vacating Hearing, United States District Court, February 15, 2000 ..... 4a

C. Judgment in a Civil Case, United States District Court, February 15, 2000 ..... 21a

D. Section 4.03 of the Delta Family-Care Disability and Survivorship Plan 22a

TABLE OF AUTHORITIES

Cases — Page No.

Beecher v. Heckler 756 F.2d 693, 694-695 (9th Cir., 1984) 5

Bragdon v. Abbott 524 U.S. 624,635-637 (1998) .. i,4,6,7,13

Gatliff v. Commissioner of the Social Security Administration 172 F.3d 690,693-695 (9th Cir. 1999) 5

Helms v. Monsanto Co., Inc. 728 F.2d 1416,1421 (11th Cir., 1984) 10

Reddick v. Chater 157 F. 3d 715,721,722,724-725,729 (9th Cir. 1998) 4, 11,12

Reginnitter v. Commissioner of the Social Security Administration 166 F.3d 1294,1296,1299 (9th Cir. 1999) 4

Statutes

28 USC section 1254(1) 2

42 USC section 423(d)(2)(A) 12

Employee Retirement Income Security Act of 1974, 29 USC section 1132(a)(1)(B) 5

PETITION FOR WRIT OF CERTIORARI

Petitioner Brenda Rambo respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit.

I.

Citations of Orders and Opinions Entered:

The orders and opinions entered in the Courts upon which this petition is based are as follows:

A. **Order Granting Defendant's Motion For Summary Judgment; Denying Plaintiff's Motion For Summary Judgment; Vacating Hearing**

This order was filed in the United States District Court for the Northern District of California on February 15, 2000; Case number C-99-0507 MMC (Appendix "B").

B. **Judgment In A Civil Case**

This judgment was filed in the United States District Court for the Northern District of California on February 15, 2000; Case Number C-99-0507 MMC (Appendix "C").

C. **Memorandum** - affirming the said United States District Court Judgment.

This memorandum decision was filed in the United States Court of Appeals for the Ninth Circuit on June 1, 2001, Case No. 11-15414 (Appendix "A").

II.

Bases for Jurisdiction in this Court:

A. **Bases for Jurisdiction**

The bases for jurisdiction in this Court are that the United States Court of Appeals has decided an important Federal Question in a way that conflicts with a relevant decision of this Court, and that the United States Court of Appeals has decided an important question of Federal law that has not been, but should be, settled by this Court. The decision sought to be reviewed is the said **Memorandum** filed on June 1, 2001, in the United States Court of Appeals for the Ninth Circuit on June 1, 2001, Case Number 00-15414 (Appendix "A"), which affirmed the United States District Court judgment and order.

B. **Statutory Provision Conferring Jurisdiction**

The statutory provision which confers on this Court jurisdiction to review on a Writ of Certiorari the decision in question is 28 USC 1254(1).

III.

Statement of the Case

A. Facts

Petitioner, a former reservations agent for Delta Airlines, was receiving disability benefits since July 1987, pursuant to the long term disability provision of the Respondent Delta Family-Care Disability and Survivorship Plan ("Plan") under ERISA, due to a back injury from an automobile accident in January 1985. That Plan, under section 4.03, cited as follows in relevant part, defined a long term disability as follows:

> "The Employee shall be eligible for Long Term Disability provided he is disabled at that time as a result of demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work, but not including work performed in connection with a rehabilitation program approved by the Administrative Committee...." (Appendix "D")

The Plan terminated her disability benefits in December 1994 on the grounds that her back injury was no longer disabling. Petitioner filed an action against the Plan in United States District Court, seeking to restore benefits on the grounds that she remained disabled due to her back condition.

During the pendency of that action, in June 1996, Petitioner was diagnosed with AIDS, with the probability that she had been infected with the Human Immunodeficiency Virus (HIV) in 1994, however, the HIV issue was not litigated in that action. The Plan was awarded summary judgment.

Petitioner's subsequent reapplication for benefits, based on her HIV disability, and HIV combined with her back condition, was denied. She therefore filed another action in the United States District Court for the Northern District of California. Petitioner relied on ***Bragdon v. Abbott***, 524 U.S. 624, 635-637, 644 (1998) to support her contention that asymptomatic HIV constituted a disability of a major life function. The United States District Court ruled that ***Bragdon*** applied to impairment of a major life function under the Americans With Disabilities Act (ADA) but was not relevant here.

Petitioner also relied on Court of Appeals' decisions on Social Security Administrative Law Judges' rulings to support her contentions that:

1. A treating physician's opinion cannot be rejected without specific and legitimate reasons supported by substantial evidence. ***Reginnitter v. Commissioner of the Social Security Administration*** 166 F.3d 1294, 1296,1299 (9th Cir. 1999) and ***Reddick v. Chater*** 157 F.3d 715,722,725 (9th Cir. 1998)

2. A Claimant's illnesses must be considered in combination and must not be fragmentized in evaluating their effects. ***Beecher v. Heckler*** 756 F.2d 693,694-695 (9th Cir. 1984)

3. A Claimant's residual functional capacity, including the ability to undertake sustained work activity, must be shown by expert testimony. ***Reddick v. Chater*** *(supra)* 157 F.3d 715, 729 (9th Cir. 1998)

4. The termination of disability requires evidence of the ability to hold a job for a significant period of time. ***Gatliff v. Commissioner of the Social Security Administration*** 172 F. 3d 690, 693-695 (9th Cir. 1999)

The United States District Court ruled that decisional case law concerning the Social Security Act was not relevant to this case (Appendix "B," 13:5-9).

B. **Basis for Federal Jurisdiction in the United States District Court**

The United States District Court's jurisdiction was pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) 29 USC section 1132(a)(1)(B).

C. Reasons Relied on for Allowance of Writ

1. *Bragdon v. Abbott* Applies to ERISA Cases

The United States District Court order granting summary judgment included the following pertinent language:

> "Plaintiff, on the other hand, failed to provide any medical report or doctor's opinion that her alleged HIV related symptoms were so severe that she was continuously and totally incapable of engaging in any occupation. The only evidence presented by plaintiff in that regard were her own report to Dr. Palacio in 1996 of "chronic fatigue, recurrent vaginal yeast infection, and night sweats" beginning in 1992, and a July 8, 1990, emergency room record indicating that she was treated for severe headaches, fever, and atypical lymph.
>
> "In arguing that these symptoms are sufficient to constitute a disability, plaintiff first relies on the Supreme Court's opinion in ***Bragdon v. Abbott***, 524 U.S. 624 (1998). In ***Bragdon***, the Supreme Court held that HIV infection may constitute a disability under the ADA definition of disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." (citation)

> "The ADA definition of disability, however, differs substantially from the definition of disability under the Plan. Therefore, whether plaintiff would be considered disabled under the ADA based on HIV infection is not relevant here. Rather, the relevant inquiry is whether the Plan's finding that plaintiff was not disabled under the Plan contradicted the plain meaning of the Plan. Plaintiff has failed to produce any medical evidence to support such a conclusion (Appendix "B," p. 12)."

The 9th Circuit Court of Appeals in affirming the District Court, stated, inter alia, that, "***Bragdon*** is inapplicable because it dealt with the definition of disability under the Americans with Disabilities Act, which differs dramatically from the Plan's definition. See id., at 639-40." (Appendix "A", p.3)

That ruling conflicts with the meaning and intent of ***Bragdon v. Abbott***, 524 U.S. 624 (1998) where this Court found that the HIV virus follows a predictable course of invading the blood cells and body tissues and that it must be regarded as a physiological disorder with a constant and detrimental effect on the hemic and lymphatic systems from the moment of infection.

See pp.635 and 636 of ***Bragdon***:

"The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks; circulating HIV can be detected within 10 weeks. (citations)

"After the symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections. Although it varies with each individual, in most instances this stage lasts from 7 to 11 years. The virus now tends to concentrate in the lymph nodes, though low levels of the virus continue to appear in the blood. (citations) It was once thought the virus became inactive during this period, but it is

now known that the relative lack of symptoms is attributable to the virus' migration from the circulatory system into the lymph notes. (citation) The migration reduces the viral presence in other parts of the body, with a corresponding diminution in the physical manifestations of the disease. The virus, however, thrives in the lymph nodes, which, as a vital point of the body's immune response system, represents an ideal environment for the infection of other CD4+ cells. (citation) Studies have shown that viral production continues at a high rate. (citation) CD4+ cells continue to decline an average of 5% to 10% (40 to 80 cells/mm3) per year throughout this phase." (citation)

The opinion stated on p. 637:

"In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and

lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of as physical impairment during every stage of the disease." (emphasis added)

The opinion further stated on p. 644:

"Every court which addressed the issue before the ADA was enacted in July 1990, moreover, concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap." (citations)

"We are aware of no instance prior to the enactment of the ADA in which a court or agency ruled that HIV infection was not a handicap under the Rehabilitation Act."

2. The Applicability of Appellate Decisions Regarding Social Security Cases to ERISA Cases Is Uncertain

There is questionable uniformity of law between the 9th and 11th circuits, regarding whether Social Security appellate decisions are relevant to ERISA. The ERISA case of ***Helms v. Monsanto Co., Inc.*** 728 F. 2d 1416 (11th Cir. 1984) at p. 1421 states that Social Security cases dealing with disability provisions have followed a parallel path:

"Social Security cases dealing with disability provisions have followed a parallel path. (fn.7) It is

> clear that the standard for disability under the Social Security Act is a stringent one. (fn.8) The applicant must be unable to engage in 'any...substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. (citation) As the Fifth Circuit has pointed out, the showing required of the claimant is 'so stringent that it borders on being unrealistic' (citation) (emphasis added)
>
> "Yet, in spite of its strictness, the Social Security Act's requirements for disability are framed in terms of gainful employment and not just nominal employment."

The United States District Court Order Granting defendant's motion for summary judgment filed February 15, 2000, affirmed by the Ninth Circuit, ruled, inter alia, that decisional case law based on Social Security regulations did not impose a requirement on an ERISA plan administrator.

See the following pertinent language from the District Court order:

> "In attempting to establish that her HIV infection constituted a disability, plaintiff also relies on ***Reddick v. Chater***, 157 F.3d 715 (9th Cir. 1998). In

Reddick, the Ninth Circuit held that an administrative law judge's decision to deny the plaintiff Social Security benefits was not supported by substantial evidence because the judge had failed to credit medical reports from the plaintiff's treating physicians that the plaintiff had suffered from chronic fatigue syndrome, a disease characterized by periods of debilitating fatigue.

"Because the symptoms accompanying her HIV infection are similar to the symptoms of chronic fatigue syndrome, plaintiff argues, her HIV infection constitutes a disability. This argument is without merit. First the ***Reddick*** case concerned the Social Security Act and not ERISA. The definition of disability under the Social Security Act requires that one must be unable to engage in 'any...substantial gainful work which exists in the national economy'. 42 USC section 423(d)(2)(A). This definition of disability differs from and is broader than that utilized by the Plan, and therefore is not relevant to the instant case. Second, plaintiff has not been diagnosed with chronic fatigue syndrome, nor has plaintiff submitted any medical report indicating that the symptoms of HIV infection are similar to or as severe as those of chronic fatigue syndrome. (emphasis added)

"Accordingly, because plaintiff has failed to provide any evidence that her HIV infection caused her to be

> continuously and totally prevented from engaging in any occupation, the Court finds that the Plan's decision to deny her long-term disability benefits did not contradict the plain meaning of the language of the Plan." (Appendix "B," p. 19)

Because Social Security has strict standards of what constitutes a disability, and the law requires standard safeguards to protect the claimant from arbitrary denials of disability, an ERISA plan should have similar safeguards, as disability provisions under Social Security and ERISA are both federally regulated for the protection of Americans disabled from employment. Accordingly, the Courts of Appeals' Social Security decisions should be relevant to ERISA cases to the extent that the cases establish such safeguards.

IV.

Conclusion

Because of the numerous HIV cases nationwide, it is of significant public importance that this Court rule whether its holding in ***Bragdon***, that asymptomatic infection with the HIV virus is an impairment from the moment of infection, applies to ERISA cases, or whether it is limited to cases under the Americans With Disabilities Act. Although the ***Bragdon*** decision arose out of an action under the Americans With Disabilities Act and the major life function held to be impaired was the ability to bear children, that decision graphically states the universally debilitating effects of an HIV infection. Therefore, the exclusion of the application of the ***Bragdon*** decision from an ERISA case unduly narrows the meaning and intent of ***Bragdon***.

Further, there is uncertainty whether United States Court of Appeals' decisions on Social Security cases also apply to ERISA cases. Because there are numerous Social Security decisions decided by the Courts of Appeals, a decision from this Court on the applicability of such decisions to ERISA cases would provide needed certainty.

WHEREFORE, Petitioner requests this Court to issue a Writ of Certiorari to decide the foregoing important questions of law.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cathy A. Catterson, Clerk
U.S. Court of Appeals
Filed: June 1, 2001

BRENDA RAMBO, Plaintiff-Appellant, v. DELTA AIRLINES, INC., Defendant, and DELTA FAMILY-CARE DISABILITY SURVIVORSHIP PLAN, Defendant-Appellee.	No. 00-15414 DC No. CV-99-00507-MMC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted May 15, 2001**
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges.

Brenda Rambo sought judicial review of the denial of her claim for disability benefits by the administrator of the Delta Family Care Disability and Survivorship Plan (the Plan), a private employee benefits plan governed by the Employee Retirement Income Security Act. The district court granted summary judgment against Rambo, and this timely appeal followed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court's grant of summary judgment de novo. *McKenzie v. Gen. Tel. Co.*, 41 F.3d 1310, 1314 (9th Cir. 1994). The district court determined that it was required by collateral estoppel to review the decision of the Plan's administrator only for abuse of discretion. Rambo has not challenged this collateral estoppel ruling on appeal, so we likewise review the decision of the Plan's administrator only for abuse of discretion.

The district court did not err by failing to require the Plan's administrator to consider the combined efforts of Rambo's illnesses. The district court properly concluded that its review was limited to the evidence that was before the administrator when Rambo's benefits were denied. *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1472 (9th Cir. 1994); *see also Tremain v. Bell Indus, Inc.*, 196 F.3d 970, 976-77 (9th Cir. 1999). The court found that Rambo had not presented any evidence of the combined effects of her illnesses to the administrator. On appeal, Rambo has neither challenged this finding nor pointed to any such evidence. Consequently, her argument regarding combined effects is without merit.

The district court was not compelled to find that Rambo is disabled under the Plan either by *Bragdon v. Abbott*, 524 U.S. 624 (1998), or by the reports of Rambo's doctor, Dr. Hermania

Palacio. *Bragdon* is inapplicable because it dealt with the definition of disability under the Americans with Disabilities Act, which differs dramatically from the Plan's definition. *See id.* at 639-40. The evidence of Dr. Palacio's reports cited by Rambo does not show that Rambo was disabled under the Plan — it does not indicate that Dr. Palacio has ever even alleged that in 1994 Rambo suffered from a "demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent [her] from engaging in any occupation whatsoever for compensation or profit, including part-time work."

The Plan's definition of disability does not exceed any requirements that are imposed by case law. Rambo cites *Helms v. Monsanto Co.* 728 F.2d 1416 (11th Cir. 1984), and *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan,* 85 F.3d 455 (9th Cir. 1996), but neither case imposes any constraints that are violated by the Plan.

The district court found that Rambo had not presented any evidence to the administrator showing that she was disabled at the relevant time. Rambo has not challenged this finding on appeal. Consequently, the district court did not err by failing to require the Plan's administrator to take vocational evidence or to identify a particular job that Rambo could perform. *McKenzie,* 41 F.3d at 1317-18.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

Filed: February 15, 2000

BRENDA RAMBO

Plaintiff,

v.

DELTA FAMILY CARE DISABILITY AND SURVIVORSHIP PLAN

Defendant.

_____/

No. 99-0507 MMC (BZ)

ORDER GRANTING DEFENDANT'S MOTION OR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; VACATING HEARING

Before the Court are the cross-motions for summary judgment of plaintiff Brenda Rambo ("Rambo") and defendant Delta Family Care Disability and Survivorship Plan (the "Plan"). Having considered the papers submitted in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for February 4, 2000, and rules as follows:

BACKGROUND

The following facts are not disputed by the parties. The Plan is a non-contributory employee welfare benefit plan, established and maintained pursuant to the Employee Retirement Income Security Act ("ERISA"). The Administrative Committee ("Committee") is the named fiduciary of the Plan for purposes of its operation and administration and has the exclusive power to interpret the Plan. (Piper Decl. ¶¶ 6,7 & Ex. A.) The Plan provides benefits for the employees of Delta Air Lines ("Delta") and dispenses such benefits from a trust fund into which Delta periodically transfers funds on a non-refundable basis. (Piper Decl. ¶ 4.)

An employee is eligible for long-term disability benefits under the Plan if he becomes disabled while on the active payroll of Delta "as a result of demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work...." (Piper Decl. ¶ 15, Ex. A § 4.03.)

The Plan provides for two levels of administrative review by which a claimant may appeal denial of a claim. Denied claims are initially reviewed by the Administrative Subcommittee whose members are appointed by, but not members of, the Committee. The second level of review is provided by the full Committee which consists of eight members and meets quarterly to review the appeals of denied claims. (Piper Decl. ¶ 9.)

Plaintiff is a former Delta employee who suffered a back injury in an automobile accident in 1985 and, based on that injury, applied for and received short-term and long-term disability benefits from the Plan. Plaintiff ceased working for Delta on July 9, 1987. (Def. Mot. at 7.)

Plaintiff continued to receive long-term disability benefits until December 9, 1994, when the Committee voted to terminate plaintiff's receipt of long-term disability benefits for her back injury. *Id.* This decision was based primarily on: (1) the reports of two physicians, Dr. Lazar and Dr. Hines, who concluded that plaintiff was capable of engaging in semi-sedentary work, and (2) the Social Security Administration's denial of plaintiff's application for Social Security benefits for the same reason. *Id.*

On May 24, 1996, plaintiff challenged this denial of benefits by filing an action in federal court, *Rambo v. Delta Air Lines, Inc.*, C-96-1930 DLJ (N.D. Cal.) (*"Rambo I"*). In her complaint, plaintiff asserted causes of action under both the Americans with Disabilities Act ("ADA") and ERISA. Plaintiff's ERISA claim was based on her allegation that she continued to be disabled as a result of her back injury and was therefore entitled to further disability benefits under the Plan. *Id.*

On July 2, 1997, at oral argument on defendant's motion for summary judgment, plaintiff mentioned for the first time that she was suffering from AIDS, and wished to seek long-term disability benefits on that basis. On August 20, 1997, plaintiff filed a long-term disability claim with the Plan based on AIDS related illnesses ("August 20 application"). (Def.'s Req. for Judicial Notice, Ex. B ("October 6 Order").)

By order dated July 23, 1997 United States District Judge D. Lowell Jensen granted defendant's motion for summary judgment on plaintiff's ADA claim and also on her ERISA claim, to the extent that such claim was based on her back injury. (Def.'s Req. for Judicial Notice, Ex. A ("July 23 Order").)

In the October 6 Order, Judge Jensen found that plaintiff had failed to exhaust her administrative remedies with respect

to her ERISA claim based on AIDS related illnesses because the Plan had yet to rule on her August 20 application. Accordingly, Judge Jensen dismissed the claim for lack of jurisdiction. (October 6 Order at 3-4.)

Plaintiff's August 20 application to the Plan for AIDS related disability benefits was based primarily on statements by two of her treating physicians: Dr. Hermania Palacio and Dr. Stephen Lee. In a form report. Dr. Palacio, who began treating plaintiff in June 1996, stated that Ms. Rambo's initial HIV test, taken in June 1996, revealed that she had a CD4 or T-cell count of less than 200, "indicative of AIDS, and highly suggestive of initial HIV infection 8 to 10 years prior to 6/96." (AC 0310) Dr. Lee, who started treating plaintiff after 1996, stated by letter dated April 23, 1997 that plaintiff probably had been infected with HIV for eight to ten years. (AC 0135)

In early September 1997, Plan representatives requested additional medical information from all physicians who had treated plaintiff during the period surrounding and after her last period of active employment with Delta.

In response to this additional request, the Plan received statements from Dr. Palacio, Dr. Trent Andrews, Dr. Ralph Roan, and Dr. Shelly Zaglin. Dr. Palacio stated that plaintiff reported to him that she had suffered from "chronic fatigue, recurrent vaginal yeast infections, and night sweats," symptomatic of HIV infection. (AC0309-0310.) None of the doctors except Dr. Palacio stated there was any indication that plaintiff had been infected with HIV prior to Dr. Palacio's diagnosis in June 1996. Further, none of the other doctors who responded to the inquiry made any notations during their treatment of plaintiff that she was febrile (not related to any recent surgery), had frequent diarrhea, complained of night sweats or that she had a significant unexplained weight loss,

also symptomatic of HIV infection. (AC0327-29, AC0316-18, AC 346-47)

On November 5, 1997, the Plan asked Dr. Glenn Goodhart, a specialist in infectious diseases, hyperbaric medicine and health law, to conduct an independent review and evaluation of plaintiff's medical records and to advise the Plan whether he found any evidence therein of plaintiff being totally and continuously disabled from AIDS or any other diagnosed condition as of December 4, 1994. (AC0534-37) On November 20, 1997, Dr. Goodhart issued a report stating that there was insufficient information upon which to make a diagnosis of AIDS and requested additional information. Dr. Goodhart further stated that he disagreed with Dr. Palacio's opinion that plaintiff's CD4 count indicated that plaintiff had been infected eight to ten years earlier. In Dr. Goodhart's opinion, such "speculation" based on current CD4 levels is "dangerous, if not silly." (AC0539-40)

On December 23, 1997, the Plan asked plaintiff to submit a complete record of her treatment for HIV. (AC0543-44) This information was received on February 24, 1998 along with a letter stating that plaintiff's son, born on June 16, 1995, tested positive for HIV antibodies, but negative for HIV infection. (AC0545)

On March 11, 1998, Dr. Goodhart, based on this additional information, issued a report stating that, although plaintiff's current CD4 count suggested that she did acquire HIV months to years before she was diagnosed on June 5, 1996 as being HIV positive, the time at which plaintiff actually acquired HIV remained speculative. (AC 0651) In Dr. Goodhart's view, "to speculate that [plaintiff's] CD4 count was less than 200 [i.e. indicative of AIDS] prior to December 4, 1994 would be silly". Dr. Goodhart concluded "it is my opinion that plaintiff was

totally and continuously disabled from AIDS only from June 5, 1996, onward." (AC0651)

On April 15, 1998, the Plan informed plaintiff that she did not qualify for long-term disability benefits based on an AIDS related disability (AC0659-61) On May 12, 1998, plaintiff appealed the decision to the Plan's Administrative Subcommittee. (AC0662) At its July 14, 1998 meeting, the Administrative Subcommittee affirmed the denial of plaintiff's benefits, noting the absence of any medical evidence that plaintiff had AIDS prior to plaintiff's June 1996 diagnosis. (AC0676-79)

On August 17, 1998 plaintiff appealed the Administrative Subcommittee's decision to the Committee. In support of her appeal, plaintiff submitted a July 8, 1990 emergency room record indicating that plaintiff was treated for severe headaches, fever, and atypical lymph, and that plaintiff had tested negative for mononucleosis at that time. (Def. Mot at 11.) Plaintiff also submitted a copy of *Bragdon v. Abbott,* 524 U.S. 624 (1998), in which the United States Supreme Court held that HIV infection may constitute a "disability" under the meaning of the ADA. (*See* discussion infra.)

This additional information was provided to Dr. Goodhart for his review. On October 19, 1998, Dr. Goodhart stated that the symptoms plaintiff exhibited on July 8, 1990 were not specific for acute HIV infection, and even if plaintiff had been infected with HIV as of 1990, no evidence indicated that she had AIDS at any time prior to June 1996. (AC0736)

At its December 11, 1998 meeting, the Committee upheld the denial of long-term disability benefits under the Plan. (AC 0001-05) After reviewing all of the medical information and opinions provided, the Committee concluded that no evidence had been submitted establishing that plaintiff actually suffered from AIDS, as opposed to being infected with the HIV virus,

prior to December 9, 1994. The Committee further found that there was no evidence establishing that plaintiff had been disabled as a result of HIV infection prior to December 9, 1994. By letter dated December 28, 1998, the Plan informed plaintiff of this decision in a detailed five-page letter setting forth the reasons for the Committee's decision. (AC 0001-05)

On February 1, 1999, plaintiff filed the present action, seeking review of the Plan's denial of her claim for long-term disability benefits based on plaintiff's HIV infection and a combination of her HIV infection and her back injury. On November 5, 1999, both plaintiff and defendant filed the present motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

DISCUSSION

A. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Supreme Court's 1986 "trilogy" of *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), requires that a party seeking summary judgment show the absence of a genuine issue of material fact. The moving party need not produce admissible evidence showing the absence of a genuine issue of material fact when the nonmoving party has the burden of proof, but may discharge its burden simply by pointing out that there is an

absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 324-25, 106 S. Ct. at 2553-54.

Once the moving party has done so, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Fed. R. Civ. P. 56(c)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50, 160 S. Ct. at 2511 (citations omitted). When determining whether there is a genuine issue for trial, "inferences to be drawn from the underlying facts...must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356 (citation omitted).

B. Standard of Review

The first step in analyzing the parties' cross-motions for summary judgment is to determine the appropriate legal standard by which the Court must review the Plan's denial of plaintiff's benefits. When an employee benefits plan gives discretion to the plan administrator to determine eligibility and to construe terms of the plan, a court must uphold the plan administrator's decision unless it was "arbitrary and capricious" or an "abuse of discretion".[1] *Firestone Tire and Rubber Co. v. Brush*, 489 U.S. 101 (1989).

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[1] The terms "arbitrary and capricious" and "abuse of discretion" are used interchangeably in the Ninth Circuit. *See Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1321 n.1 (citing examples).

Where an "apparent conflict of interest"[2] exists, however, the court will subject the plan administrator's decision to the "less deference" test or "heightened scrutiny" to determine whether a "serious" conflict of interest exists. *McDaniel,* 2000 WL 140699 at 5, n.6; *Bendixen v. Standard Ins. Co.,* 185 F.3d 939, 943 (9th Cir. 1999). Under the "less deference" test, "a plan participant must come forward with material probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self interest caused a breach of the administrator's fiduciary obligations." *Id.* (internal quotation and citation omitted) If the beneficiary meets this burden, the burden shifts to the plan administrator to provide evidence that the apparent conflict of interest did not affect the decision to deny benefits. If the plan administrator fails to satisfy its burden, the decision to deny benefits is reviewed de novo. *Id.*

Defendant argues that the Court should apply the abuse of discretion standard and without heightened scrutiny because any issues regarding the appropriate standard already have been decided in defendant's favor in *Rambo I,* and plaintiff therefore is collaterally estopped from re-litigating the same issues in the present case.

Plaintiff concedes that the doctrine of collateral estoppel precludes her from relitigating the issue of whether, based on the language of the Plan, the abuse of discretion standard applies in the present case. Plaintiff argues, however, that although the issue of heightened scrutiny was raised in *Rambo I,* she is not collaterally estopped from relitigating the matter because the present issue, whether the Plan had a serious conflict of interest in 1997, is a different issue from that

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[2] "[A]n 'apparent' conflict of interest exists whenever a plan administrator is responsible for both funding and paying claims." *McDaniel v. Chevron Corp.,* -- F.3d --, 2000 WL 140699 at 5 n.6 (9th Cir. 2000)

decided in *Rambo I,* whether the Plan had a conflict of interest in 1994. (Def. Reply. at 1.)

"To foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." *Clark v. Bear Sterns & Co., Inc.,* 966 F.2d 1318, 1320 (9th Cir. 1992).

In determining whether two issues are the "same" for purposes of collateral estoppel, the court must consider the following factors: (1) whether there exists substantial overlap between the evidence or argument in the two proceedings; (2) whether the new evidence or argument involves the application of the same rule of law as involved in the earlier proceeding; (3) whether pretrial preparation and discovery in the first proceeding reasonably could be expected to have embraced the matter to be presented in the second; and (4) the closeness of the relationship between the claims involved in the two proceedings. *T.J. Starker v. United States,* 602 F.2d 1341, 1344 (9th Cir. 1979).

In the present case, the specific arguments and evidence upon which plaintiff relies in support of her position that the Plan acted under a serious conflict of interest in rendering its 1997 decision are identical to the arguments and evidence upon which plaintiff relied in *Rambo I.*[3] (Pl. Mot. 6-9; Diekmann

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[3] In both *Rambo I* and the present case, plaintiff argued that the Plan had a conflict of interest because: (1) members of the Administrative Committee and the Administrative Subcommittee are all employees of Delta; (2) the Plan did not allow plaintiff to participate in a rehabilitation program, and (3) the Plan did not offer plaintiff vocational training or accommodation for her disability.

Decl. Ex. A, ¶. 2-7, Pl. Mot. in *Rambo I,* ¶. 4-7.) The same rule of law is involved in both proceedings, and plaintiff's present claim is closely related to her claim in *Rambo I,* both claims entailing a denial of ERISA benefits under the same plan.

Accordingly, the Court finds that the present conflict of interest issue is the same issue that was raised in *Rambo I.* Further, because that issue was actually litigated in *Rambo I,* and necessary to Judge Jensen's decision in that case, the Court finds that plaintiff is collaterally estopped from relitigating the issue in the present case.[4]

For the reasons set forth above, the Court finds that the abuse of discretion standard of review, without heightened scrutiny, is the appropriate standard by which to evaluate the Plan's decision to deny plaintiff long-term disability benefits in the present case.

C. Abuse of Discretion

Under the abuse of discretion standard, ERISA plan administrators have "wide discretion short of plainly unjust measures to decide questions of eligibility." *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302, 1308 (9th Cir. 1986) (internal quotations and citations omitted). Accordingly, any reasonable decision of a plan administrator should be upheld. *Clark v. Washington Teamsters Welfare Trust,* 8 F.3d 1429, 1432 (9th Cir. 1993). Further, in evaluating a plan administrator's decision under the abuse of discretion

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[4] Even if the doctrine of collateral estoppel did not bar the relitigation of this issue, the Court finds that plaintiff has failed to establish that the Plan had a conflict of interest when it denied plaintiff's 1997 claim. Accordingly, for the same reasons expressed in Judge Jensen's July 23 Order, the Court finds, based on the merits of this case, that the abuse of discretion standard, without heightened scrutiny, is the appropriate standard of review.

standard, courts may only consider the arguments and evidence before the administrator at the time the decision was made. *Sandoval v. Aetna Life and Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).

The Ninth Circuit has identified three elements to consider in determining whether a plan administrator's decision constituted an abuse of discretion: (1) whether the plan based its decision on findings of fact that were clearly erroneous; (2) whether the decision contradicts the plain language of the plan; and (3) whether the decision was made without explanation. *Bendixen,* 185 F.3d at 944.

The first factor to consider in determining whether the Plan abused its discretion is whether the Plan based is decision on clearly erroneous findings of fact. A plan administrator's findings of fact are not deemed to be clearly erroneous so long as the plan's decision was supported by substantial evidence. *Snow v. Standard Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996). "Substantial evidence is such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decisionmaker]." *Sandoval,* 967 F.2d at 382.

Plaintiff argues that the Plan abused its discretion in denying her claim because it only considered evidence of a disability based on HIV, as opposed to a combination of different illnesses. Plaintiff alleges she is disabled due to a combination of her HIV infection and back injury as well as breast cancer and depression.[5]

In support of this argument, plaintiff relies on *Beecher v. Heckler,* 756 F.2d 693, 694-95, (9th Cir. 1985) in which the Ninth Circuit held that the administrative law judge's decision to deny the plaintiff Social Security disability benefits had not

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[5] Plaintiff's complaint fails to mention any disability due to breast cancer or depression.

been supported by substantial evidence because the administrative law judge had only considered medical reports concerning plaintiff's physical illnesses as opposed to medical reports that concluded the plaintiff was disabled based on psychological factors.

The present case is distinguishable from *Beecher* for two reasons. First, *Beecher* involved the denial of social security benefits. Social Security regulations require that an administrative law judge consider multiple impairments when determining eligibility for benefits. 20 C.F.R. § 416.923. Plaintiff cites to no case which imposes such a requirement on an ERISA plan administrator.

Second, in contrast to *Beecher,* the Plan did consider evidence both of plaintiff's back injury and HIV infection. Evidence concerning plaintiff's back injury was considered in her 1994 claim, and the Plan determined that plaintiff was not disabled on that basis. Evidence concerning plaintiff's HIV infection was considered in her 1997 claim, and the Plan determined that plaintiff was not disabled on that basis. At no time during the evaluation of her 1997 disability claims did plaintiff produce any medical report or other evidence indicating that a combination of these conditions caused her to be disabled before or as of December 1994. Further, plaintiff failed to provide the Plan with any evidence that she was disabled due to her breast cancer or depression and, consequently, the Plan did not consider those illnesses in determining her eligibility for long-term disability benefits.

Accordingly, the Court finds that the Plan's 1997 decision to deny plaintiff's disability claim based only on the evidence concerning her HIV infection was supported by substantial evidence as plaintiff had failed to present any evidence of a disability based on combined illnesses.

The second factor to consider in determining whether the Plan's decision was an abuse of discretion is whether the Plan's decision to deny plaintiff long-term disability benefits contradicted the plain meaning of the Plan. Under the abuse of discretion standard, any reasonable interpretation by the plan administrator of plan terms should be upheld. *Fielding v. Int'l Harvester Co.*, 815 F.2d 1254, 1256.

The definition of disability under the Plan, as noted above, is an injury or disease which "will continuously and totally prevent [the employee] from engaging in any occupation whatsoever for compensation or profit, including part-time work." In finding plaintiff's condition did not meet this definition of disability, the Plan relied on reports from Doctors Andrews, Roan, and Zaglin, all of whom had treated plaintiff at various times during the prior nine years for various illnesses and stated they had not seen any signs of HIV related illness, such as fatigue, nausea and severe headaches before December 1994. The Plan also relied on the report of Dr. Goodhart, a specialist in infectious diseases, who conducted a review of plaintiff's entire medical file, and also concluded that plaintiff had failed to show she was disabled due to her HIV infection prior to December 1994.

Plaintiff, on the other hand, failed to provide any medical report or doctor's opinion that her alleged HIV related symptoms were so severe that she was continuously and totally incapable of engaging in any occupation. The only evidence presented by plaintiff in that regard were her own reports to Dr. Palacio in 1996 of "chronic fatigue, recurrent vaginal yeast infection, and night sweats" beginning in 1992, and a July 8, 1990 emergency room record indicating that she was treated for severe headaches, fever, and atypical lymph.

In arguing that these symptoms are sufficient to constitute a disability, plaintiff first relies on the Supreme Court's opinion

in *Bragdon v. Abbot,* 524 U.S. 624 (1998). In *Bragdon,* the Supreme Court held that HIV infection may constitute a disability under the ADA definition of disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *See* 42 U.S.C. § 12102(2)(A); *Bragdon,* 524 U.S. at 636.

The ADA definition of disability, however, differs substantially from the definition of disability under the Plan. Therefore, whether plaintiff would be considered disabled under the ADA based on HIV infection is not relevant here. Rather, the relevant inquiry is whether the Plan's finding that plaintiff was not disabled under the Plan contradicted the plain meaning of the Plan. Plaintiff has failed to produce any medical evidence to support such a conclusion.

In attempting to establish that her HIV infection constituted a disability, plaintiff also relies on *Reddick v. Chater,* 157 F.3d 715 (9th Cir. 1998). In *Reddick,* the Ninth Circuit held that an administrative law judge's decision to deny the plaintiff Social Security benefits was not supported by substantial evidence because the judge had failed to credit medical reports from the plaintiff's treating physicians that the plaintiff had suffered from chronic fatigue syndrome, a disease characterized by periods of debilitating fatigue.

Because the symptoms accompanying her HIV infection are similar to the symptoms of chronic fatigue syndrome, plaintiff argues, her HIV infection constitutes a disability. This argument is without merit. First, the *Reddick* case concerned the Social Security Act and not ERISA. The definition of disability under the Social Security Act requires that one must be unable to engage in "any...substantial gainful work which exists in the national economy". 42 U.S.C. § 423(d)(2)(A). This definition of disability differs from and is broader than that utilized by the Plan, and therefore is not relevant to the instant

case. Second, plaintiff has not been diagnosed with chronic fatigue syndrome, nor has plaintiff submitted any medical report indicating that the symptoms of HIV infection are similar to or as severe as those of chronic fatigue syndrome.

Accordingly, because plaintiff has failed to provide any evidence that her HIV infection caused her to be continuously and totally prevented from engaging in any occupation, the Court finds that the Plan's decision to deny her long-term disability benefits did not contradict the plain meaning of the language of the Plan.

Plaintiff's final argument is that the Plan abused its discretion in finding that she was totally disabled because the Plan failed to identify an occupation in which she could work. In support of this argument, plaintiff relies on *Farrow v. Montgomery Ward Long Term Disability Plan*, 176 Cal.App.3d 648 (1986), in which the state court of appeal held that where an ERISA Plan determines that a claimant is totally disabled, it must support that decision by identifying jobs for which the claimant is qualified.

In *McKenzie v. General Telephone Co. of Cal.*, 41 F.3d 1310, 1317 (9th Cir. 1994), however, the Ninth Circuit held that a plan, in finding that a plaintiff is not totally disabled, need not always identify a job that the plaintiff would be capable of performing. In *McKenzie*, the court found that substantial evidence supported the plan's conclusion that the plaintiff could perform some occupation and that the medical evidence did not support a finding that the plaintiff was incapable of employment. The Ninth Circuit held that "consideration of vocational evidence is unnecessary where the evidence in the administrative record supports the conclusion that the claimant does not have an impairment which would prevent him from performing some identifiable job." *McKenzie*, 41 F.3d at 1317.

A review of the administrative record in the present case indicates that substantial evidence supports the conclusion that plaintiff could engage in some occupation as of December 1994. In its 1994 decision denying plaintiff long-term disability benefits based on her back injury, the Plan found that plaintiff was capable of engaging in semi-sedentary work. Further, as noted above, plaintiff failed to produce any medical evidence to indicate that she was incapable of working as a result of her HIV infection. As in *McKenzie,* the evidence in the administrative record supports the conclusion that plaintiff was not completely prevented from engaging in some type of occupation as of December 1994. Accordingly, the Court finds that the Plan did not abuse its discretion in failing to identify a specific occupation in which plaintiff could have worked.

CONCLUSION

For the reasons set forth above, the Court finds that the Plan did not abuse its discretion in denying plaintiff's claim for disability benefits based on HIV related illnesses and, accordingly, hereby GRANTS defendant's motion for summary judgment and DENIES plaintiff's motion for summary judgment.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: FEB 15 2000

/s/ Maxine M. Chesney

MAXINE M. CHESNEY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
Filed: February 15, 2000

JUDGMENT IN A CIVIL CASE

BRENDA RAMBO

v.

DELTA AIRLINES

CASE NUMBER:
C-99-0507 MMC (BZ)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Court hereby GRANTS defendant's motion for summary judgment and DENIES plaintiff's motion for summary judgment.

FEB 15 2000
Date

Richard W. Wieking
Clerk

COPIES MAILED TO
PARTIES OF RECORD

/s/ Tracy Lucero
(By) Deputy Clerk

APPENDIX D

Section 4.03 of the Delta Family-Care Disability and Survivorship ERISA Plan

"4.03. *Long Term Disability:* If upon expiration of the Employee's Short Term Disability period, he continues to qualify for Short Term Disability, the Employee may apply for Long Term Disability. The Employee shall be eligible for Long Term Disability provided he is disabled at that time as a result of demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work, but not including work performed in connection with a rehabilitation program approved by the Administrative Committee. During the period an Employee qualifies for Long Term Disability, he will be eligible to receive monthly income benefits in an amount determined under Section 6.01. The Employee shall be eligible for Long Term Disability benefits so long as he remains disabled in accordance with this subsection and Section 4.01."